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Critical Legal Studies for the Intelligent Lawyer

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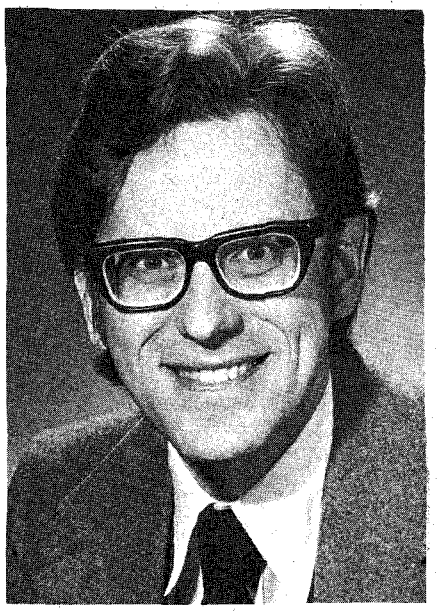

What is Critical Legal Studies? In one sense that is an uninteresting question, for CLS (I shall use the acronym) is nothing more than a group of friends who share a similar politics and who got some media attention, like the "brat pack" of movie fame a few years ago or the "beat generation" poets of the fifties.[1] This is particularly true because much of the media attention has to do with perfectly normal ructions associated with the intergenerational transfer of power and prestige at the Harvard Law School.[2] Such ructions are so common in academic institutions that there is an "old" proverb to cover them. "Academic politics is so bitter because there is so little at stake," it is said, though when peoples lives and fortunes get entangled in such trivia through the tenure process, as has recently happened at some schools, then the triviality has gotten out of hand.

There is another side to CLS that might be of interest to practicing lawyers but which I am not going to talk about, the side that is a specialized part of a broad and diverse movement aimed at loosening up legal education to find places for more practical and more theoretical material. I will not talk about this side because it is not distinctively CLS, indeed the movement, now sixty years old, includes people of all political stripes, from quite right through quite left. This movement is based on the assumption that without real theory with which to approach and understand

* Professor of Law, State University of New York at Buffalo. This article is an edited version of a talk delivered to the Board of Directors of the Law School's Alumni Association, February 20, 1987. Thanks should be extended to them for their hospitality.

[1] I have previously written about this side of C.L.S. See Schlegel, "Notes Toward an Intimate, Affectionate and Opinionated History of the Conference on Critical Legal Studies", 36 *Stan. L. Rev.*, 391 (1984).

[2] Evidence in support of this assertion can be found in the fact that with little more than a peep the Stanford Law School selected as its new dean an individual commonly associated with Critical Legal Studies although the faculty is anything but dominated by members of the group.

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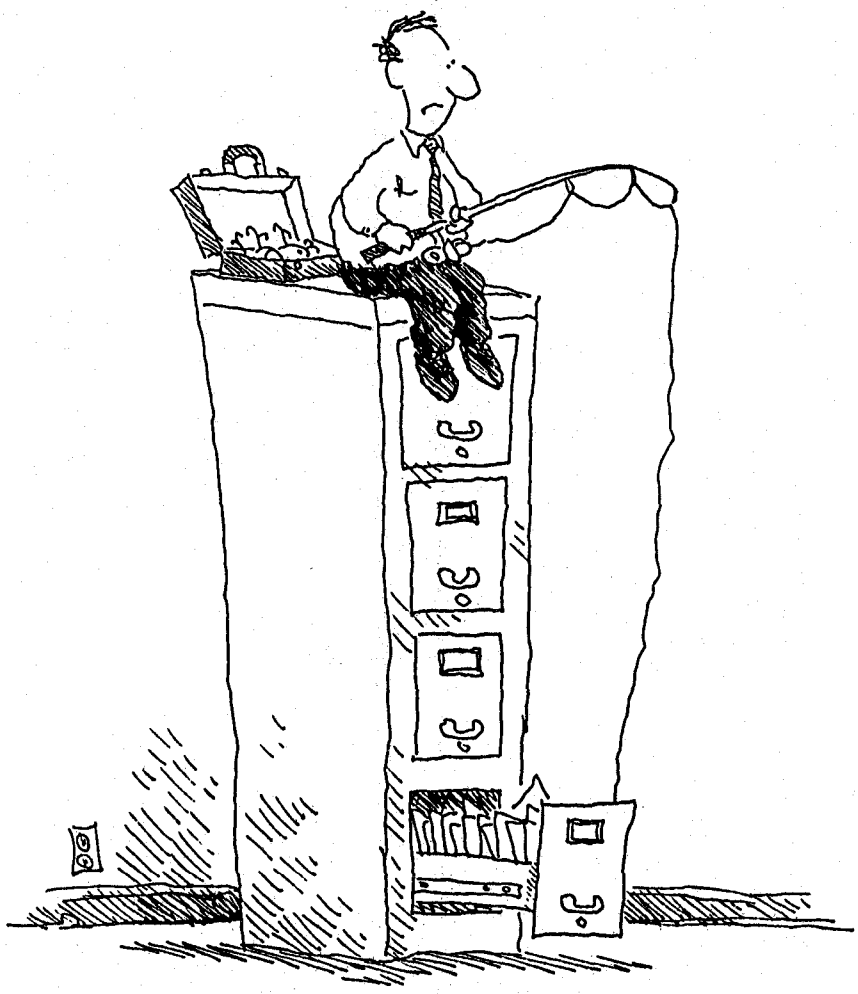

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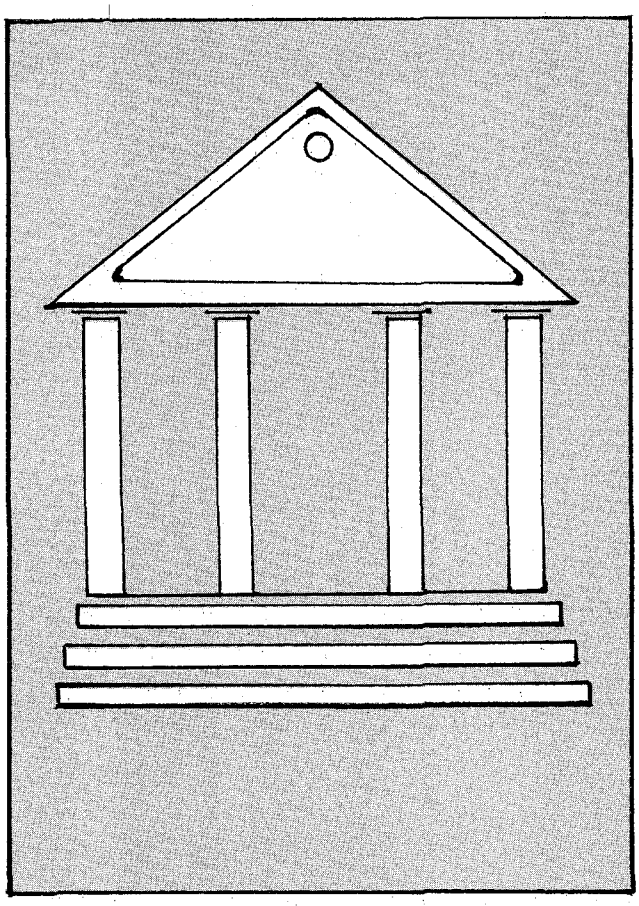
changes in the practice of law, practical skills are of, at best, near term value; that without real practical understanding with which to inform theory, such theory is basically hot air; and that without both theory and practice, the doctrinal learning in between is useful for passing a bar exam and for writing memos for a few years after law school, but for little else.

There is a third side to CLS that is interesting, if not completely new and different, at least to me, though whether it is of interest to practicing lawyers I will leave to my readers to decide. This is the pure legal theory that underlies CLS scholarship. To make some sense out of this theory one has to go back to the 19th century political theory which undergirds Langdelian Legal Theory, the dominant legal theory at the end of the 19th century.[3]

All of 19th century political theory is a part of the tradition of liberal political theory, meaning not politically liberal, but not monarchist or otherwise elitist. Basic to this branch of political theory is a series of inter-related dichotomies: the distinction between rights and power; the distinction between majority rule and tyranny; the distinction between the passions of individuals and the interests of groups; the distinction between public law, which is seen as coercion and private law, which is seen as a matter of consent; and the underlying distinction, basic to legal thought, between law and politics. The basic notion is that law is a matter of rights that respond to interests and politics is a matter of passion and power. We sometimes refer to this as the notion of the rule of law, the notion of law as rules binding conduct both of individuals and of decision makers.

As this political theory works itself out in the lower reaches of legal theory as the Langdelians laid it out, law is the product of the authoritative premises of the law and the determinative techniques of



legal reasoning. This theory can be, and has been caricatured rather easily as mechanical jurisprudence, but the design of it is really very straight forward. And its function is to assure that in the hands of judges, and derivatively of lawyers, the working from authoritative premises with determinative technique generates single right answers, answers which thus guarantee that these non-elected officials carry out the will of the majority, its interests, rather than exercise the tyrannical or corrupt authority of their personal passions.

In the years between World War I and World War II a group of law professors called the American Legal Realists, participating in the developments elsewhere in the intellectual world, attacked the 19th century notion that law is the union of authoritative premises and determinative technique. Now, a word about this group of people. First, they all accepted the 19th century world of political theory and its collection of interrelated disjunctive definitions. Second, they all were deep and abiding democrats, not in the party sense, but in the small "d" sense. Third, their politics was in fact left of center; they all were New Deal Democrats. The Realists' argument was two-fold. First they asserted that the premises were not authoritative, that, infact, the premises of law are contradictory and contrasting, determinative of nothing, and more importantly

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[3] A word needs to be said about what follows. It is often said that C.L.S. is not a school of thought but rather a movement, a diverse group of individuals pursuing related projects. There is some truth to this observation, and some falsity as well. The falsity is to be found in my ability to tell the story that follows; the truth, in that many if not most of the individuals prominently associated with C.L.S. would disagree with some or all of my story and tell different stories. I nonetheless stick by my story as they would stick by theirs. For those who would seek a more diverse and/or detailed understanding of matters I suggest consulting a selection of the works found in Kennedy & Klare, A Bibliography of Critical Legal Studies, 94 *Yale L.J.* 461 (1984).

varied with the legal material being discussed. Second, they asserted that the technique was not determinative either, that the technical equipment of the lawyer is varied, is designed to generate different kinds of answers, and is highly specific to individual circumstances.

The important thing to understand about the American Legal Realists is that, however bright these academics may have been, they did not understand that, by arguing that the technique was not determinative and that the premises, not authoritative, they were, in effect, undermining the entire structure of liberal political theory. They did not understand that all of a sudden they were opening the theory up to the claim that nothing constrains judicial decision. Such an opening is important because it allows radical democrats to argue for the direct political control over the judiciary, as is the case with other officials like legislators who are known to be subject to their passions, and radical authoritarians to argue for the superiority of direct administrative, hierarchical control of the court system.

The best evidence that the Realists were not aware of the revolutionary potential to their assertions is that they repaired the system flimsiest of goods. In place of authoritative premises, they utilized a notion, live at the time, that through the aid of science, particualrly empirical social science, one could identify the real premises, the real rules of the system. And in place of determinative technique, the Realists similarly argued that science can generate the facts about the behavior of the individual in the legal system, from which information one could understand whether or not the system was operating efficiently and how to improve it.

Of course, there are all sorts of weaknesses with these notions. Now we understand that having gotten the facts about the real premises and people's behavior, one still has to ask what the premises ought to be and how people ought to behave. But at the time the Realists did not understand that very well. Nevertheless they created an enormous amount of noise of which we all are heirs.

In the late Thirties, especially after the publicization of the Doctor's Purge and the slow growth in our understanding of the threat of totalitarian government generally, and Nazism government in particular, the claim that all this realist theorizing is anti-democratic was heard throughout the country. Then after a brief flap over this claim, everything disappeared into the crucible of World War II. On the other side of this great transformative event, Realism was gone. In its place were scholars, largely centered at Harvard and Columbia in the late 40s and early 50s, who in response to implicit realist arguments, offered a plea in confession and avoidance. Their claim was simple. Granted that the premises of law are not authoritative and the technique of legal reasoning, not determinative, nonetheless if one looks at the legal process, at the way things customarily go in law, one finds generally acceptable answers. In particular, if one looks for neutral principles, for unbiased starting places, and keeps decision makers within their proper spheres, everything will be fine.

The most curious thing about this group of thinkers, the so-called legal process school, is how easily they abandoned the 19th century's constraint on legal activity, on the anti-majoritarian character of the judicial power, and how quickly they substituted for that constraint a kind of direct look at its supposed political results. If the judges stay in their place, the legislature stays in its place, and the executive stays in its place then everything will be fine, is their argument. And yet it was just such order that 19th century theory was designed to produce.

In the Sixties that wishful thinking began to destruct at an incredibly fast pace. The intellectual critiques were two. The first is one that any lawyer would understand and it is astonishing that such a good group of lawyers actually missed it. Anyone knows that lawyers are good at manipulating process because process often determines outcomes. So to say that the process just jogs along only rephrases the problem. What kind of biases are in the process? What kind of manipulation of outcomes comes from choosing that process? The second is something which is equally easy to come at for a lawyer. Anyone knows that there are no really neutral starting points. Starting points are neutral because someone says they are neutral, but they are not neutral in fact for one gets different outcomes from different starting places. Thus again were the authoritative premises - the neutral principles - and determinative techniques - the legal process - of the law in shambles.

The intellectual destruction of the legal process edifice was accompanied by the general social destruction of post-war life. Through a general disinclination towards American politics in its traditional form, begins, I think, with, the election of John F. Kennedy, this disinclination is further played out through the Vietnam War and the problems that many people had with our government's defense of that enterprise. There was abroad in the land a sense that politics as usual was no longer acceptable.

At this juncture a group of young scholars, almost all involved in late Sixties and early Seventies law reform and anti-war activity, in the true euphoria of those days, began teaching law. Looking for a theory to explain the times, they examined what they had been taught, the legal theories of the legal process scholars, and they were not pleased. Disgruntled, they went back to Realism in a very real sense, back to

the notion that the premises of law are not authoritative and its technique, not determinative and to the central, though unarticulated, insight of the Realists. Simply stated: law is politics. The distinction between law and politics that is at the root of liberal political theory is wrong headed in that law like politics has significant distributive outcomes in the world and that is why people take it seriously.

All of this history is, I think, rather easy for the intelligent lawyer to understand. What makes CLS difficult for such a lawyer is the explanation given for why this is so, for the identity of law and politics. This explanation is difficult because it relies on two great strands in the intellectual world to which most lawyers have not been exposed: Western European Marxism and a general movement starting in anthropology but ultimately linking up in literary theory called Structuralism or more generally, postmodernism.

When Americans think of Marxism they think of old fashioned state socialism on the Russian model. Americans do not generally realize that Western European Marxism killed that traditional Marxism sometime in the Fifties and Sixties. Indeed, as an intellectual force old fashioned state socialist Marxism probably died with the Hitler-Stalin pact in 1940. For the intellectuals that event killed off, once and for all, the notion that something wonderful was going on in Russia. And if that event did not, Russian the activities in eastern Europe after World War II culminating in the crushing of the Hungarian Revolution did. Marxists in western Europe attempted to keep their intellectual tradition alive by devleoping a theory to explain how, if a change in the ownership of the means of production did not make world that much better, some other change might. They came up with two notions. One was a deep notion of the importance for socialism of community based alternatives to state power. The other notion was an emphasis on the way that thinking makes things true, the way that ideology, the world picture that we create of what is normal social behavior, makes things appear normal.

The other great strand of contemporary intellectual thought that CLS relies on is Structuralism. It began with anthropologists trying to understand what was similar about differing cultures, but ultimately linguists trying to understand about language took the movement over. At the center of this body of theory is the very simple insight that words bear no necessary relation to anything else. A narrow, hollow, transparent vessel with a bottom is a glass and not a cat because we say it's a glass and not a cat. We could just as well have all agreed that a glass is called "cat" and the little funny, furry thing that I greet in the morning that goes meow is a "glass". From this elementary, some might say idiotically simple, observation these theorists want to understand how we come to know what is a glass and what is a cat. The answer generally given is that meaning is only possible in the context of other meanings. Thus, one knows what a thing is because of the way it fits with other things and not because of its intrinsic properties. A glass is not a glass because it participates in "glassness" but because it is not a "glade" or a "glaze" (linguistic similarity and difference) and because it is not a vase or a cup (substantive similarity and difference). Thus we come to understand our world in the pattern of relations that are set by a group of speakers.

Now anyone can see where the ideas of European Marxism and Structuralism begin to come together. The Structuralists say its a web of interconnected definitions that make up our understanding of the world. And the European Marxists say it is our ideological understanding of what is normal behavior that creates the world of meaning. Both suggest that if one wants to understand the way things work in this world one should notice the way the societies, the cultures, the sub-cultures put the pieces of their world together . . . notice their ideology, their set of shared definitions.

All of this european scholarship feeds back into legal theory in a very straight forward way. One can easily understand why the premises are not authoritative and the technique not determinative. Language is not logically determinative of anything; it contains no necessary relationships, and the only thing we have to put the system together is language. Thus we create our meanings. The obvious question then is "Now do people communicate?" This body of theory answers this question very simply. We as a culture, as a group of humans select from the enormous range of possible meanings and understandings of the world those which we will treat as available, as acceptable, as plausible. It is not plausible to call a glass a cup. Similarly although one can put together a perfectly plausible argument from the text of the U.S. Constitution that capitalism is unconstitutional that argument is not plausible, not within the bounds of acceptable discourse. We have defined our world of argument so that that is not a sensible argument.

The import of this answer to the question of communication for judicial decision-making should be quite obvious. A judge interprets the arguments and events in a case in light of the culture, the collection of meanings that are commonly ascribed, in which he or she participates. Thus, what one is doing when one is arguing before the judge is attempting to establish the normal (in the sense of normative not in the sense that that is the way everbody does or uses it) meaning of events. This meaning, however, is not logically determined and thus a

lawyer is always fighting over, contesting meanings. That is why lawyers can both do things and do new things. They are working in a system in which meaning is both indeterminate as a matter of logic and yet in some vague sense shared.

The next obvious question is how do people select the meanings that words will bear? With this question Critical Legal Studies begins to bite at the gut level and yet in some sense is of the least interest, because it gives at least three answers. The first answer is the doctrinalist answer, the so-called irrationalist position. The answer to the question of where these meanings come from is "no where special". Law, in the sense of legal doctrine, is largely unrelated to anything other than itself. In the words of the scholarly catch phrase, it is relatively autonomous. Law is a mandarin culture, the musings of a bunch of very highly trained human beings who spin their culture out for their own benefit. This law is not a great capitalist conspiracy, it is a group of people who put together their own way of thinking about the world, which way of thinking tends to legitimate their position and activities in the world, to make them seem normal, acceptable, but that probably does not entail much in the way of real world effects other than to allow people acting in the world as lawyers and judges and legislators to sleep better at night because this way of thinking gives them a sense that what they are doing is meaningful. Thus, law is essentially an ideology, a world view that gives lawyers a sense that what they are doing is useful and proper but ultimately is little else.

The second answer to the question of how people select the meanings that words will bear may remind people a great deal of old fashioned Marxism as they remember it newspaper editorials. This answer, contrary to the first, argues that legal doctrine in some real sense directly aids the social and economic interest of the ruling elites. Somehow the lawyers intuitively understand what the needs of the economy and of these elites are and thus "tilt" doctrine in the appropriate direction. Thus, while words have no necessary relationship to things, economic interest informs the meanings that words take.

As an historical matter, the position I just described, the one with the most direct link to old fashioned Marxist analysis, was the initial one. The irrationalist position, surely the dominant one in CLS at this time, was essentially a response. In good dialectual fashion, coming after the thesis and the antithesis, there is a synthesis and the synthesis goes is a third answer to the ques-

Continued on Page 64

Critical Legal Studies for the Intelligent Lawyer
Continued from Page 15

tion of how people select the meanings that words will bear.

One can get at this third answer by noting that there is something deeply troubling about the irrationalist position. If law is so irrelevant, why does everyone care about it? Something more has got to be at stake; law cannot just be the book of bed time stories for anxious, tired lawyers. Similarly there is something bewildering about the more marxist sounding position. How do lawyers know what the capitalists need? First, lawyers have to do something more than just use a ouiji board. And second, there is no neat one to one relationship between economic interest and legal doctrine; we have changed doctrine in lots of circumstances and it has not made a lot of difference. These two observations lead to a focus on the lawyer in the legal profession. A lawyer participates in two worlds: a world of government and a world of economics. These are in some sense the same world and yet are at the same time different. The lawyer mediates between these two worlds, attempts to fuse the pattern of doctrine with the pattern of economic and other understandings, with the ideology as it were, of the dominant social actors.

Individuals persuaded by this notion are concerned about the day-to-day activities of lawyers - what do they do, how did they translate the needs of their clients into doctrine, how they re-shape the doctrine to fit those needs, how they reshape the needs to fit the doctrine. This is, I think, probably the emerging corner of CLS, the one average lawyers do not hear a lot about. One hears about the irrationalist side because it assults the profession's sense of its own dignity. Those friends of mine who believe this position love to make really quite outrageous statements that are designed to infuriate people. And one hears a lot about the seemingly marxist side because its direct political challenge infuriates conservatives of all stripes, as well as liberal reformers. But because the third group has, as of yet, developed no theory about practice that might infuriate any one, one hears little about.

One might, of course, say "Give them time." That response raises, I think, the question of why there is all the flap about CLS since the basic position is now sixty years old and the refinements coming out of European thought, hardly threatening to anyone. At the first and most superficial level the stories in the popular press tell it all. If something is wrong at the Harvard Law School then the barbarians are at the gates. At the second level, one must remember that the legal academic world is very small. Any tempest in a teapot that small will create lots of noise.

At a third and more important level, we are seeing in law something that we have seen in other parts of the intellectual world over the last 35 years or so: the breakdown of liberal theory. The claim that law is politics is much more than a move in an intellectual game. It is both destabilizing and worrisome to lawyers. Lawyers do not think of themselves as doing politics so that thought is disorienting to people and thus raises all sorts of phobias . . . "These are socialists maybe there's a creeping commie there too". At the same time, it is not wholly surprising that the world of the law should begin to absorb some of the unease that has been in the world of political theory in this country for the last 35-40 years. That unease was seen as the New Frontier, the Great Society and in all of those "We've got to rethink that we're doing, the way we're distributing wealth and the way that our system operates" movements that began to appear in the late Fifties.

At a fourth level is, I think, a proposition that most of my friends would not hold, but which I think has to be faced up to by them at sometime. Legitimation is not all wrong. It would be a very strange church in which all the priests were atheists. Some people react negatively to CLS because they understand that these scholars say that the old rites, the old sacraments of the law, don't work and that assertion is bothersome to them. At a fifth and last level, there are lots of people who quite honestly despise politics and are in law for just that reason. I don't think one can get away from this fact. Further, many people think that communitarian and socialist politics stinks. This last aspect to the flap over CLS is of course fundamental. Most of the people whom one might identify as Critical Legal scholars share a politics that is communitarian, redistributionist, often radically egalitarian, and profoundly adverse to American domestic and foreign policy over the last twenty years. Whether that politics is sensible or not is, for present purposes, irrelevant. But if one is afraid of that politics then it is not unreasonable to make a fuss over CLS.

What then is Critical Legal Studies? A media event, an episode in the reform of legal education, a politics and for the intelligent lawyer a theory about law that has both old and new pieces. Hopefully that theory is thought provoking to the practicing bar for in a real sense that theory is directed at the bar as an understanding of its work.